

In the Supreme Court

Appeal from the Michigan Court of Appeals and the
Third Circuit Court, Honorable Robert J. Colombo, Jr.

DESERAI LAWSON, Next of Friend of
ZHIMON BINGHAM, A Minor,

Plaintiff-Appellee

Supreme Court No: 130872
Court of Appeals No: 256388
Lower Court No: 03-314614-NO

vs

KREATIVE CHILD CARE CENTER, INC.,

Defendant-Appellant

130872

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

(As permitted by Court Order of July 21, 2006)

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PROOF OF SERVICE

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PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF

I. PLAINTIFF'S MINOR'S STATEMENT TO HIS MOTHER IDENTIFYING FREDDIE MARKS AS HIS SEXUAL ATTACKER IS ADMISSIBLE UNDER MRE 803(4) AS A "STATEMENT MADE FOR THE PURPOSES OF MEDICAL TREATMENT OR DIAGNOSIS" BECAUSE THE STATEMENT WAS PART OF THE NECESSARY PROCESS FOR PLAINTIFF'S MINOR TO OBTAIN MEDICAL TREATMENT AFTER BEING SEXUALLY ASSAULTED BY AN HIV POSITIVE PERSON.

Plaintiff's minor's statement to his mother identifying Freddie Marks as his sexual attacker is admissible under MRE 803(4) as a "statement made for the purpose of medical treatment or diagnosis" because the statement was part of the necessary process for Plaintiff's minor to obtain medical treatment after being sexually assaulted by an HIV positive person. Plaintiff's minor, at the time of this incident, was a two-year old child. He was unable to drive or call an ambulance. He had no understanding of sexual terminology. He was unable to effectively communicate with his doctor about the sexual abuse. Without the assistance of his mother, he was certainly unable to obtain medical treatment for himself. He relied on his mother, as his caretaker, for his medical needs. To this end, his contemporaneous communications that his "butt hurt" and that "Uncle Fred checked out my butt" were statements made to his mother for the purposes of obtaining medical diagnosis and treatment. He was conveying to his mother his need for medical treatment so that the source of his pain, a penetrated rectum, could be diagnosed and treated. This statement carries with it the same inherent guarantees of trustworthiness and reliability as any statement made by an adult to their physician. Moreover, the identification of Freddie Marks as the perpetrator was medically relevant to Plaintiff's minor's diagnosis and treatment: **Freddie Marks is HIV positive.**

Other jurisdictions, including the federal courts, have recognized that **a statement made for purposes of medical diagnosis and treatment does not need to be made to a physician**. In fact, the advisory committee notes that accompany FRE 803(4) specifically recognize that a statement made for purposes of medical diagnosis and treatment does not need to be made to a physician. In fact, such a statement is admissible whether it is made to hospital personnel, ambulance drivers, **or family members**.

[U]nder the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, **or even members of the family might be included**.

United States v Kappell, 418 F 3d 550, 556 (6th Cir 2005)(emphasis added). Other jurisdictions have also applied this rule. In *State v Maldonado*, 536 A.2d 600 (Conn 1988), the trial court admitted a child-victim's statement to a security guard that identified the sexual attacker as a statement made for purposes of medical treatment or diagnosis. A similar conclusion was reached in *State v Smith*, 337 SE 2d 833, 840 (N. Car 1985). In *Smith*, the trial court admitted the children's statements to their grandmother that identified their sexual attacker as a statement made for purposes of medical diagnosis and treatment. In doing so, the court recognized:

While, here, Gloria and Janell did not specifically request medical attention, we recognize that young children cannot independently seek out medical attention, but must rely on their caretakers to do so. Their statements to Mrs. Davis immediately resulted in their receiving medical treatment and diagnosis. We hold, therefore, that Mrs. Davis's testimony regarding her conversations with Gloria and Janell resulting in their being examined, diagnosed and treated at new Hanover Memorial Hospital on 5 March 1984 was properly admitted as substantive evidence pursuant to Rule 803(4) hearsay exception.

Id. at 840

In fact, when determining the admissibility of such statements, the federal courts have adopted a test similar to that adopted by our Court of Appeals in their unpublished opinion. That test was first announced in *United States v Iron Shell*, 633 F.2d 77 (8th Cir 1980). Under this two-part test, a trial court is to consider: (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment and (2) the content of the statement must be such as is reasonably relied on by a physician. *Id.* at 84. See also *People v LaLone*, 432 Mich 103; 437 NW2d 611 (1989) and *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992)

This Court first considered the *Iron Shell* test in *LaLone, supra*. At that time, the Court cited the two-part test with approval. The Court again had the opportunity to consider the *Iron Shell* test in *Meeboer, supra*. In *Meeboer*, the Court reviewed three cases wherein a child-victim's statement identifying their sexual attacker was admitted under MRE 803(4). In considering the *Iron Shell* test, the Court noted the importance of establishing the child's understanding to tell the truth. *Id.* at 324. The Court then adopted a "totality of circumstances test", which consists of a list of ten (10) factors that a trial court should consider in evaluating a child-victim's statement. *Id.* at 325. However, the Court was clear to caution that the factors are neither inclusive or exclusive and that **"an analysis of the available evidence can support an application of MRE 803(4) even where it is not apparent that the child understood that statements must be truthful in order to receive proper care."** *Id.* at 326 (emphasis added)

In *Meeboer, supra* the Court also considered the "reasonable necessity" prong of the *Iron Shell* test. *Id.* at 328. The Court noted the importance of identification of the sexual attacker where the child has been exposed to sexually transmitted diseases, including acquired immune deficiency syndrome, which cannot be detected in the early stages after sexual assault. *Id.* at 328-29. The case

at bar is a perfect example of a situation where the identification of “who assaulted complainant” is directly related to medical diagnosis and treatment. Plaintiff’s minor’s statements, as repeated by his mother, regarding “what happened” was relevant to the diagnosis and treatment rendered, however, of greater importance was Plaintiff’s minor’s statement regarding “who assaulted” him. The physician relied upon that statement in ordering tests, medication and follow-up treatment for the plaintiff’s minor. Had the mother not conveyed that Freddie Marks, an HIV positive male, was the sexual attacker, Plaintiff’s minor would not have received the HIV testing, HIV counseling, or antiviral medication that potentially saved him from contracting this deadly disease. The identification of Freddie Marks was critical to Plaintiff’s minor’s diagnosis and treatment.

Plaintiff’s minor’s statement satisfies both prongs of the test adopted in *Iron Shell*, *supra* as later articulated in *LaLone* and *Meeboer*. First, Plaintiff’s minor’s motive in making the statement was certainly consistent with the purposes of promoting treatment. Plaintiff’s minor spontaneously communicated a source of pain to his mother: that his butt hurt. The purpose of his statement was so that she could provide medical treatment, or obtain medical treatment, that could alleviate his pain. In response, Plaintiff asked a neutral, non-leading question to her son to determine the origin of that pain. Plaintiff’s minor responded that “Uncle Fred checked out my butt” and indicated, with the use of dolls, that acts of oral sex and sexual penetration were performed on him. Plaintiff’s minor had no motive for his statement beyond informing his mother of the origin of his pain so that she could provide appropriate medical treatment. Furthermore, his statement identifying “Uncle Fred” is medically relevant to the treatment provided because Freddie Marks is HIV positive.

Plaintiff’s minor’s statement also satisfies the second-part of the *Iron Shell* test because it

was reasonably relied upon by a physician. The fact that Plaintiff's minor was sexually assaulted by an HIV positive man was vital to the treatment he was provided. At Children's Hospital, Plaintiff's minor was tested for HIV, he was provided antiviral medication, he was counseled by an HIV specialist and he was referred to the Immunology Clinic for further evaluation and testing. Thereafter he was tested several times for HIV. He was also continued on antiviral medications for period of at least six weeks. The treatment that was rendered makes it abundantly clear that this information was relied upon by a physician. This information was critical to Plaintiff's minor's diagnosis and treatment.

This case is precisely the type of situation envisioned in *Iron Shell* and *Meeboer* wherein the identification of the sexual attacker is medically relevant to the diagnosis and treatment provided to the child-victim. Moreover, the fact that the statement was made to Plaintiff does not preclude application of MRE 803(4). Other jurisdictions, including the federal courts, have allowed statements made to family members, social workers, psychologists, or even security guards. Plaintiff's minor's statement to Plaintiff was a crucial part of the process of obtaining medical treatment. Had Plaintiff's minor not communicated this information to his mother, he would not have received the vital, life-saving medical treatment that he needed. Clearly Plaintiff's minor's statement that he was sexually attacked by Freddie Marks falls within MRE 803(4) as a statement made for purposes of medical diagnosis and treatment. That statement was vital to Plaintiff's minor receiving the proper diagnosis and treatment.

II. PLAINTIFF'S STATEMENTS TO THE EMERGENCY ROOM PHYSICIAN THAT PLAINTIFF'S MINOR REPORTED BEING SEXUALLY ASSAULTED BY FREDDIE MARKS ARE ADMISSIBLE UNDER MRE 803(4) AS "STATEMENTS MADE FOR PURPOSES OF MEDICAL TREATMENT OR DIAGNOSIS" BECAUSE THE STATEMENTS WERE A CONTINUATION OF THE PROCESS OF OBTAINING MEDICAL DIAGNOSIS AND TREATMENT FOR PLAINTIFF'S MINOR, THE STATEMENTS HAD THE REQUISITE INHERENT GUARANTEES OF TRUSTWORTHINESS, AND THE STATEMENTS WERE REASONABLY NECESSARY TO PLAINTIFF'S MINOR'S DIAGNOSIS AND TREATMENT, AS HE HAD BEEN ATTACKED BY AN HIV POSITIVE PERSON.

Plaintiff's statements to her son's physicians that Plaintiff's minor reported being sexually assaulted by Freddie Marks are admissible under MRE 803(4) as "statements made for purposes of medical diagnosis." **These statements were a continuation of the process of obtaining medical diagnosis and treatment for Plaintiff's minor.** Furthermore, these statements had the requisite inherent guarantees of trustworthiness and were reasonably necessary to plaintiff's minor's diagnosis and treatment, as he had been sexually attacked by an HIV positive person. In fact, other jurisdictions have used 803(4) to admit parents' statements to medical personnel that identify a sexual attack of their child-victim when the statement was medically relevant to the diagnosis and treatment of the child-victim. This application of 803(4) is especially common in situations that involve young children of tender years who are unable to effectively communicate with their physicians.

For instance, a mother's statement to a physician about the sexual assault of her young child were held to be admissible under 803(4) in *Galindo v US*, 630 A.2d 202 (D.C. 1993). **The child was three years old.** In *Galindo*, the court admitted the mother's statements to the physician under the medical diagnosis exception to the hearsay rule, even though the mother herself was not the patient. In doing so, the court stated:

Under the medical diagnosis exception to the hearsay rule, statements made by a patient for purposes of obtaining medical treatment are admissible for their truth because the law is willing to assume that a declarant seeking medical help will speak truthfully to medical personnel

we find no principled basis . . . not to apply the same rationale to a parent who brings a very young child to the doctor for medical attention; the parent has the same incentive to be truthful, in order to obtain appropriate medical care for the child.

Id. at 210 (emphasis added). *See also Petrocelli v Gallison*, 679 F.2d 286, 291 (8th Cir 1990)

(allowing admission of patient or family statements that are reasonably pertinent to diagnosis)

Connecticut's appellate courts have also upheld the admission of a parent's statement to a physician. *See State v Aaron L*, 830 A.2d 776 (Conn 2003). The court, applying the medical diagnosis and treatment exception of the hearsay rule, admitted statements by a mother to a pediatrician about the sexual assault of her young child. **The child was two-and-one-half-years old.** In considering the statements, the court acknowledged that a parent's statements to a physician on behalf of their young child have the same inherent guarantees of trustworthiness as other statements admitted under 803(4). The court also recognized that a two-and-one-half year old child is unable to communicate effectively with their physician.

We first consider the defendant's claim that the hearsay testimony of the victim's mother with respect to what she reported to the child's pediatrician, Cersonsky, was inadmissible. The victim's mother took her to Cersonsky out of concern that the victim may have been assaulted sexually because of statements the child had made to her about touching the defendant's penis. **The two-and-one-half-year-old child would not communicate with the physician. Consequently, it was necessary for the victim's mother to explain to the physician why she had brought her daughter to see him. Because the victim's mother was seeking medical advice, and possibly treatment for the victim, she had every reason to be forthright with Cersonsky.** As Cersonsky made known in his testimony, the child's statements were relevant, as they directed his examination of her and contributed to his decision to inform the authorities. The statements were also relevant to any treatment or advice he may have given the victim.

Id. at 790 (emphasis added)

Plaintiff's statements to Plaintiff's minor's physicians are admissible under MRE 803(4). These statements have the same inherent guarantees of trustworthiness as if the statements were made directly from the child to the physician. Furthermore, as stated previously, the statement identifying Freddie Marks as the sexual attacker was reasonably necessary for Plaintiff's minor's diagnosis and treatment.

In situations like this, where the child is so traumatized by what he has endured that he is unable to repeat that statement to an unknown stranger, such as an emergency room physician, it is only reasonable that a parent would communicate what they have been told. It is absolutely imperative, especially in this situation, that the physician know that the child was sexually assaulted by an HIV positive person. Plaintiff, as the primary caretaker for her child, has to communicate that information to the physician so that proper medical diagnosis and treatment can be provided. It is certainly counter-intuitive to think that a mother does not have the same type of "self-interested motivation" to speak the truth to treating her son's treating physicians. *See Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998). For these reasons, Plaintiff's statements to her son's physicians that Plaintiff's minor reported being sexually assaulted by Freddie Marks are admissible under MRE 803(4) as "statements made for purposes of medical diagnosis." **These statements were a continuation of the process of obtaining medical diagnosis and treatment for Plaintiff's minor.** Furthermore, these statements had the requisite inherent guarantees of trustworthiness and were reasonably necessary to plaintiff's minor's diagnosis and treatment.

RELIEF REQUESTED

For the reasons stated above and in Plaintiff-Appellee's principal brief, Plaintiff-Appellee respectfully requests that this Court DENY Defendant-Appellant's Application for Leave to Appeal. Plaintiff-Appellee also respectfully requests that this Court DENY Defendant-Appellant's request for peremptory reversal.

Respectfully Submitted,

BLUM KONHEIM ELKIN & Ceglarek

Date: August 31, 2006

By:

A handwritten signature in black ink, appearing to read 'D. J. Elkin', is written over a horizontal line.

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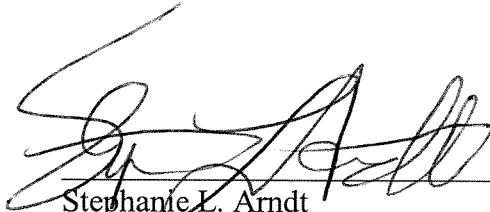
PROOF OF SERVICE

Stephanie Arndt says that on September 1, 2006, she served a copy of Plaintiff-Appellee's Supplemental Brief and this Proof of Service on counsel of record by placing the same in an envelope properly addressed to:

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and depositing the said envelope in the United States mail, postage thereon fully prepaid.

I hereby declare that the statement above is true to the best of my knowledge, information and belief.


Stephanie L. Arndt